

**OFFICE OF THE GENERAL COUNSEL**  
**Division of Operations-Management**

**MEMORANDUM OM 11-61**

June 3, 2011

TO: All Regional Directors, Officers-in-Charge  
and Resident Officers

FROM: Richard A. Siegel, Associate General Counsel

SUBJECT: Financial Remedies and Other Settlement Terms Audit  
OIG-AMR-63

Achieving compliance with a remedy ordered or agreed upon in a meritorious unfair labor practice case is intended to restore the status existing before the commission of the unfair labor practice. When a violation has resulted in the loss of employment or earnings, reinstatement and/or backpay is the standard Board remedy. The goal of the Board in determining backpay is to make whole the party who has suffered a loss of earnings and other compensation as a result of that violation. The backpay remedy also effectuates the purposes of the Act by discouraging the commission of further unfair labor practices and by assuring employees that the Government is protecting their rights under the Act.

In Fiscal Year 2010, in pursuing these compliance objectives, Regional Offices recovered \$86,557,683 on behalf of employees as backpay or reimbursement of fees, dues, and fines. Additionally, a total of 2,250 employees were offered reinstatement.

**Financial Remedies and Other Settlement Terms Audit**

The Inspector General (IG) recently completed an audit of the Agency's financial remedies and other settlement terms. The Report can be reviewed at <http://www.nlr.gov/sites/default/files/documents/200/oig-amr-63-10-02.pdf>. When conducting the audit, the IG reviewed case files in four Regional Offices in the following areas:

- 1) Obtaining Information to Calculate Backpay Early
- 2) Backpay Forms to Employees
- 3) Documentation of Backpay Calculation
- 4) Documentation of Waiver of Reinstatement
- 5) Backpay Settlements
  - i) Less than 80 percent backpay
  - ii) Settling at 80 percent
  - iii) Oversight of Settlements by Operations-Management
- 6) Employer's Share of FICA Tax
- 7) Data Accuracy in CATS

The audit revealed that the files reviewed contained documentation of the calculation of backpay due. The audit also revealed that the files reflected that the employee's share of FICA was appropriately being withheld from backpay checks. The Regions are commended for these successes. However, in a number of other areas, the audit highlighted problems with the documentation of backpay-related information in the files and the data accuracy in CATS concerning remedies obtained in settlements and formal compliance cases.

### **Obtaining Information to Calculate Backpay Early**

Estimates of backpay liability are necessary for the parties to consider settlement options prior to the issuance of complaint and thereafter. Therefore, all information in the charging party's and/or discriminatees' possession that is relevant to calculating backpay should be obtained as part of the initial investigation. Care should be taken to avoid creating the impression that requesting this information indicates the Region already considers the charge meritorious. Thus, it is appropriate to explain to the charging party/discriminatee/respondent that the Agency collects such information so that it will be prepared for potential settlement discussions *in the event* a charge is found to have merit. The following is a list of information that routinely should be obtained during the initial investigation and generally should be included in the initial affidavit in all cases in which backpay may be a remedy<sup>1</sup>:

- Names, addresses, phone numbers, e-mail addresses (contact information)
- Job classification(s)
- Wage rate(s)
- Hours of work
- Overtime (typically an estimated weekly average and whether it was seasonal or consistent throughout the year)

The following items should be included in a separate memo rather than in the affidavit:

- Benefits, health insurance, pension, vacation/severance
- Bonuses (whether routine, for example, a holiday or year-end bonus)
- Whether the case involves construction industry salting (establish backpay period)

It is also important to obtain information concerning search for work and interim earnings. This type of information should not be put in the initial affidavit. Rather, this information, along with the discriminatee's social security number and a permanent

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<sup>1</sup> In lieu of placing this information in the affidavit, Regions may elect to use a separate form which should be placed in the case file. OM 08-54 contains two forms that can be used when collecting backpay information. CMH 10504.4 will be revised to reflect this change.

address where s/he or someone who can reach him/her resides, should be documented in a file memo. Copies of the discriminatee's most recent paycheck stubs from the weeks prior to the discrimination should be obtained and placed in the file. While the best practice is to gather evidence regarding search-for-work and interim earnings early in the investigation, if this information is not collected during the initial affidavit, the information should be obtained promptly in a follow-up discussion with the discriminatee and recorded in the file.

The charging party/potential discriminatee should also be reminded during the affidavit session that, in order to be eligible for backpay, s/he must make reasonable searches for work on a regular basis and should maintain records of his/her attempts to find work, including the dates work was sought, the source of the employment lead, e.g., newspaper, internet, personal referral, etc., the name of the company contacted, the name of person with whom contact was made, the position sought and the response to the application for work. Discriminatees should also be reminded that, should they find employment, they should keep all of their paycheck stubs from their interim employers as well as receipts for work-related expenses.

### **Backpay Forms to Employees**

Section 10508.8 of the Compliance Manual requires that upon issuance of complaint, all identified discriminatees should be provided NLRB forms related to backpay and reminded of their obligation to search for work and maintain records of their efforts to obtain interim employment and of their earnings from interim employment. The Inspector General's audit revealed that backpay forms were not uniformly sent to all discriminatees who were entitled to backpay at the time the complaint issued. We recognize that providing the backpay reporting forms and search-for-work instructions can be a time consuming task, especially if a case involves multiple discriminatees. We also recognize that the large majority of merit unfair labor practice cases, including those in which backpay is due, settle prior to or within several months of the issuance of complaint. In such cases, of course, it is not necessary to prepare evidence of earnings loss and interim earnings for formal presentation to an administrative law judge. Since the vast majority of the cases settle well before the opening of the unfair labor practice trial, the need to mail out backpay forms to the discriminatees upon issuance of complaint is not necessary in all cases. Rather, in cases in which settlement is likely, regular contact should be made with the discriminatee between the date the complaint issues and the opening of the hearing by an individual designated by the Regional Director to solicit updated search for work and interim earnings information. If the case does not settle and a hearing is held, upon the closing of the record, the Region should send the forms noted below to the discriminatees.

Accordingly, in cases where it is clear that settlement is probable and the Regions are in close contact with the parties to pursue such settlement, Regions may exercise their discretion to decide whether it is necessary to send out the requests for backpay information described below upon issuance of complaint or wait until the close

of the hearing or 100 days after the issuance of complaint, whichever is sooner.<sup>2</sup> At that point, the following forms must be sent to each of the discriminatees:

- ◆ NLRB-916 Backpay Claimant Identification
- ◆ SSA 581 Authorization to Social Security Administration to Furnish Employment and Earnings Information
- ◆ NLRB-4288 Information on Backpay for Employees
- ◆ NLRB-4685 Notification of Change of Address
- ◆ NLRB-5224 Claimant Expense and Search for Work Report

Thereafter, the discriminatees should be contacted quarterly to solicit information necessary to calculate backpay. These contacts should continue until compliance is achieved.

### **Data Accuracy of CATS**

In conducting this audit, the IG compared information on the Closed Case Report (CCR) with information contained in the case file. The audit identified significant errors in the data. Since the error rate exceeded 10 percent, the audit determined the CATS data related to backpay cases did not meet the reliability standard set forth in the GAO's Standards for Internal Control in the Federal Government. The largest number of errors was found in the number of discriminatees eligible for reinstatement, total backpay due and total backpay paid. See IG Report (<http://www.nlr.gov/sites/default/files/documents/200/oig-amr-63-10-02.pdf>). In the majority of these cases, the total amount due listed on the CCR equaled the total amount paid, despite the fact that the calculation of backpay due found in the case file differed from the amount actually paid. The information contained on the CCR is used to determine Agency-wide statistics so it is imperative that it be accurate both with regard to the number of offers of reinstatement made versus the number of offers accepted and to the total backpay owed versus total backpay paid.

Since the Board agent negotiating the settlement or accepting the adjusted withdrawal is the individual most knowledgeable about the facts surrounding the settlement, s/he should be the individual to complete the CCR or enter the remedies information in CATS, or when the transition to NxGen is complete, in NxGen. Accordingly, a draft CCR initiated by the agent who negotiated the settlement or received the adjusted withdrawal/dismissal should be attached to every settlement agreement or adjusted withdrawal/dismissal sent to the Board agent's supervisor and then to the Director for approval. When the Region begins to use NxGen exclusively, the information entered in NxGen should be reviewed by the supervisor. If the numbers vary from the initial calculations, there should be a file memo explaining why. Settlement agreements and adjusted withdrawals/dismissals should not be approved without the draft CCR or without the remedy information being entered in NxGen.

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<sup>2</sup> CMH Section 10508.8 will be revised to reflect this change.

Before the supervisor approves the settlement, s/he should verify that the information on the CCR or in NxGen, including but not limited to reinstatement and amount of backpay due and paid, matches the information in the file. Similarly, by signing off on the CCR or approving the settlement in NxGen, s/he is verifying that waivers of reinstatement and appropriate approvals for settlements less than 80% are contained in the file (see below). Before the Director approves the settlement, s/he should verify that the supervisor has signed off on the CCR or approved the settlement in NxGen thus verifying that the information relating to the settlement is accurate and reflected in the file.

### **Documentation of Waiver of Reinstatement**

Section 10130.4 of the ULP Manual requires that any alleged discriminatee who is not a charging party should execute a separate waiver of reinstatement if the alleged discriminatee declines an offer of reinstatement or does not desire an offer of reinstatement. The Audit revealed that 63% of the sample files involving waivers of reinstatement did not contain written waivers. While the Casehandling Manual currently requires written waivers from discriminatees, we have determined that a note in the file from the agent reflecting that waivers (written or oral) were obtained is sufficient.<sup>3</sup> In order to ensure the completeness of the file, as noted above, before the supervisor signs off on the CCR or approve the settlement in NxGen, s/he should verify that the written documentation of the waivers of reinstatement, are in the file.

### **Backpay Settlements**

The Audit revealed that in several cases, backpay was calculated at 100%, but the Board agent began settlement discussions at 80%. The Board and the Office of the General Counsel share a commitment to resolve disputes through negotiated settlements whenever possible. Settlements benefit all parties by eliminating the expense and uncertainty of litigation. Settlements conserve Agency resources, effectuate basic goals of the Act and tend to reduce conflict in the workplace. Thus, Regions should pursue settlement of disputed compliance issues in all cases. Although settlement of disputed compliance issues is desirable, Regions should only make concessions that are warranted by the circumstances of the case. The concept of settlement recognizes that in some cases there are reasonable differences about the amount of the make-whole remedy when comparing the maximum, which may reasonably be claimed for the claimant, and the minimum, which may in good faith be fairly argued by the respondent. There may also be legitimate room for compromise with regard to other issues, such as extent of posting and implementation of the status quo ante. When concessions are made, however, the file should fully document what the full remedy should have been and the reasons the Region decided to accept less than a full remedy.

Based upon our experience, it is the very rare case where Operations-Management would disagree with a Region's determination that it is appropriate to

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<sup>3</sup> The Unfair Labor Practice manual will be modified to reflect this change.

settle a case where the discriminatee(s) will receive more than 100% backpay. Upon reflection, we have determined that it will no longer be required to seek Operations-Management's approval in these situations.<sup>4</sup>

Section 10592.1 of the Compliance Manual states Regions must obtain approval from Operations-Management in settlements involving backpay of less than 80% or more than 100%. The audit revealed that 60% of the sample files that involved settlements of less than 80% or more than 100% did not contain documentation to show the approval of Operations. Regions should ensure that Board agents are aware of this requirement as modified above. Managers and supervisors who review case files are responsible for ensuring the appropriate documentation is contained in the file before the case is closed. Accordingly, when the supervisor signs off on the Closed Case Report or approves the settlement in NxGen, s/he is affirming that, if appropriate, the file is documented with Operations' approval of the settlement.

This memorandum should be the subject of a professional staff training session. If you have any questions regarding this matter, please feel free to contact me or your Assistant General Counsel or Deputy.

/s/  
R. A. S.

cc: NLRBU  
Release to Public

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<sup>4</sup> The Unfair Labor Practice and Compliance manuals will be modified to reflect this change.